

Changes mulled for rules of conduct

by

**Patrick R. Burns, First Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (February 3, 2014)

The Minnesota Rules of Professional Conduct are based, in large part, on the ABA Model Rules of Professional Conduct. In August 2009 the ABA created the Commission on Ethics 20/20 to study the effects of technology and globalization on the practice of law. That commission ultimately recommended — and, in 2012 and 2013, the ABA adopted — a number of changes to the ABA Model Rules of Professional Conduct and the comments to those rules.

In Minnesota, subcommittees of the Lawyers Professional Responsibility Board and the MSBA Rules of Professional Conduct Committee have been meeting jointly to consider the ABA changes and to determine whether to recommend those changes be adopted here.

None of the changes adopted by the ABA will dramatically alter the practice of law as it currently exists in Minnesota. They will, however, work to clarify the rules and emphasize the need for lawyers to understand the ramifications of the technologies used during the course of practice.

As to clarification, much of this would be accomplished by adopting changes made by the ABA to the comments to the Model Rules. Therein lies a problem. When the Minnesota Supreme Court adopted a great many changes to the MRPC in 2005, they declined to formally adopt the comments to the rules. They stated that the inclusion of the comments is made for convenience and does not reflect court approval of the comments made therein. While not yet finally decided, it appears that the joint subcommittee will recommend that the Supreme Court be asked to at least acknowledge the changes in the comments, even if it chooses not to adopt them.

One clarification is in a proposed addition to the comment to Rule 1.1, MRPC, which requires lawyers provide competent representation to clients. The proposed comment language provides that before a lawyer retains another lawyer from outside the firm to assist in providing legal services to a client, the lawyer should ordinarily obtain the client's informed consent to doing so.

There are two proposed additions to Rule 1.6, MRPC, the general rule of confidentiality. The first proposed change would permit lawyers to disclose client confidential information when they reasonably believe that disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. Such disclosures could only be made if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. A second change to Rule 1.6 would specifically require lawyers to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation. A proposed addition to the comment to Rule 1.6 discusses factors to be considered in determining the reasonableness of a lawyer's efforts.

A proposed addition to the comment to Rule 1.18, MRPC, the rule on duties to prospective clients, discusses when and whether communications with a person constitute a consultation that trigger the protections of the rule. This should be of assistance in dealing with concerns over electronic communications via a lawyer's website. The proposed comment states, in part, "For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response."

The above is not a full listing of all the proposed changes. A full compilation of the ABA 20/20 recommendations and the changes adopted by the ABA may be found by going to the ABA website, www.americanbar.org, and typing Commission on Ethics 20/20 into the site's search engine.

After the joint committee in Minnesota finishes its work, the Lawyers Board and the MSBA General Assembly will likely be asked to approve a petition to the Minnesota Supreme Court for adoption of the changes recommended. The court will then likely issue an order seeking comment on the proposed changes. In the interim, should you desire more specific information or have comments on the changes being considered in Minnesota, feel free to contact the author of this article at (651) 296-3952.